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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 405

M. ROBERT GUGGENHEIM,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

Errett G. Smith,
Counsel for Petitioner.

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Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Supreme Court of the United States:

The Petition of M. Robert Guggenheim, of Washington, D. C., respectfully represents to this Honorable Court that, on June 28, 1948, the Court of Claims of the United States overruled the motion of this petitioner, plaintiff therein, for a new trial and for amendment of findings; that a writ of certiorari should be issued out of this Court to the said Court of Claims, to the end that there be certified to this Court the requisite proceedings for review of that Court's action in the case; and, therefore, petitioner respectfully shows to this Honorable Court:

I

Statement of Matter Involved

Petitioner was before the Court of Claims seeking to recover income taxes which he believes he has overpaid for 1938 and 1939, the Bureau of Internal Revenue having

rejected his claim for refund of such taxes. The basis of the claim is the remedial provisions of the 1942 Revenue Act, allowing, as non-trade or non-business expenses, certain payments pertaining to the production or collection of income or to the management, conservation, or maintenance of property held for the production of income.

Respondent, through the Bureau of Internal Revenue, previously had disallowed the same expense items, which petitioner had claimed on his income tax returns as business expenses. It made no claim that the expenses were not reasonable nor that they were not actually expended; but based its disallowance of them primarily on the ground that the taxpayer was not "engaged in business" and hence not entitled to the deductions claimed .

Prior to the Bureau's disallowance of the items as business expenses, the usual formal conferences were held, one in the office of the Internal Revenue Agent in Charge, in Washington, D. C., and another before the Technical Staff of the Bureau, in Washington. Following this latter conference, petitioner signed a "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax," its date being May 6, 1941. This was a waiver of his right to go to the Board of Tax Appeals, now the Tax Court.

Respondent added two paragraphs to the usual form of such waiver; and struck out a part of a sentence in the footnote, below a black line, at the bottom of the waiver. Neither the waiver, nor any part of it, was approved by "the Secretary, or the Under Secretary of the Treasury, or [of] an Assistant Secretary of the Treasury" (Int. Rev. Code Sec. 3761). The two added paragraphs were added solely by the respondent and by it alone, without any consultation or agreement in advance by petitioner. The text of them appears at the Court of Claims' Special Finding of Fact No. 6. (R. 12-13)

These added paragraphs (a) *were* "a part of the printed

form"; (b) they *were not* "typed on the form by the parties"; and (c) they *were not added* "after an agreement was reached on the issues in controversy." There never was any such "agreement" in the nature of a closing agreement or a compromise agreement, as the above phrase, from Finding No. 6, would imply, when read along with the added paragraphs.

It is true that these controversial paragraphs of the waiver were printed in a different manner and at a different time from the original and main body of the form. These paragraphs, along with several items at the top of the form, were printed either by mimeograph or by the multi-lithographing process (as shown by the off-set or penetration of ink through the original form to the reverse side of the paper, where it appears with a greenish-gray tinge rather than jet-black); and were added, in or about the month of "June 1940" (nearly a year *before* the Technical Staff conference—about May 1, 1941—whereat the Government is pretending an agreement to compromise was reached), by or for the Technical Staff, as the upper left corner of the form shows; the original print of the form having been "Revised April 1939," as shown by the date stricken out in the same corner.

In clarification of the form in which some of the testimony appears in the Transcript of Record herein, it should be explained that, prior to a conference in the trial Court to settle the record in this case, there was a misunderstanding, at least on the part of petitioner's counsel, to the effect that the Court had not considered certain proffered testimony, which the trial Commissioner had ruled inadmissible as evidence, but which had been included, at the end of the transcript of testimony, in the form of a proposal of proof. It now is understood that the Court of Claims, in making its findings, in deciding the case, and in writing its opinion, did consider this proffered testimony just as though it had

been in evidence; although neither the findings nor the opinion so stated nor made that idea apparent. It is understood, also, that an appropriate entry will be made, in the order settling the record, to the effect that this proposal-of-proof testimony was considered by the Court of Claims.

The trial Court's opinion does not discuss the matter of Section 121 (a) (2) of the 1942 Revenue Act being a remedial, curative, or relief statute, allowing taxpayers non-trade or non-business deductions for expense payments of the type here involved; although the opinion casually mentions the section at three different points: (1) middle of page 13; (2) last paragraph on page 14; and (3) top of page 15 of pamphlet copy. (R. 22, 23.)

II

Relevant Parts of Statutes Involved

Internal Revenue Code, Section 272(d); Title 26 U. S. C. Section 272(d); Act of May 28, 1938, c. 289, Sec. 272, 52 Stat. 535:

> "Sec. 272. Procedure in general
>
> "(d) *Waiver of restrictions.* The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of the deficiency."

Internal Revenue Code, Section 3760; Title 26 U. S. C. Section 3760; derived from several earlier Revenue Acts, including 1924 Act, Section 1006, the later amendments being by Act May 28, 1938, Sections 801, 802, 52 Stat. 573; and by Act February 10, 1939, c. 2, 53 Stat. 462:

> "Sec. 3760. Closing agreements
>
> "(a) *Authorization.* The Commissioner (or any officer or employee of the Bureau of Internal Revenue,

including the field service, authorized in writing by the Commissioner) is authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal revenue tax for any taxable period.

"(b) *Finality.* If such agreement is approved by the Secretary, the Under Secretary, or an Assistant Secretary, within such time as may be stated in such agreement, or later agreed to, such agreement shall be final and conclusive, and, except upon a showing of fraud or malfeasance, or misrepresentation of a material fact—

"(1) The case shall not be reopened as to the matters agreed upon or the agreement modified, by any officer, employee, or agent of the United States, and

"(2) In any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded."

Internal Revenue Code, Section 3761(a); Title 26 U. S. C. Section 3761(a); derived from R. S. Section 3229 through several amendments, the later amendments being by Act May 28, 1938, c. 289, Section 815, 52 Stat. 578; and by Act February 10, 1939, c. 2, 53 Stat. 462:

"Sec. 3761. Compromises

"(a) *Authorization.* The Commissioner, with the approval of the Secretary, or of the Under Secretary of the Treasury, or of an Assistant Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General may compromise any such case after reference to the Department of Justice for prosecution or defense; * * *"

Revenue Act 1942, Section 121(a)(2), (d), and (e), c. 619, 56 Stat. 798; Internal Revenue Code, as amended, Sec-

tion 23(a)(2); Title 26 U. S. C. A., pocket suppl., Sec. 23(a)(2); and, for subsections (d) and (e), see the 1942 Rev. Act, in U. S. C. A., vol. "Internal Revenue Acts Beginning 1940", pp. 187, 188:

"Sec. 23. *Deductions from gross income.* In computing net income there shall be allowed as deductions:

"(a) Expenses.

* * * * * * *

"(2) *Non-trade or non-business expenses.* In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income.

* * * * * * *

"(d) *Taxable years to which amendments applicable.* The amendments made by this section shall be applicable to taxable years beginning after December 31, 1938.

"(e) *Retroactive amendment to prior revenue acts.* For the purposes of the Revenue Act of 1938 or any prior revenue Act the amendments made to the Internal Revenue Code by this section shall be effective as if they were a part of such revenue Act on the date of its enactment."

III

Questions Presented

1. Are not the decisions of this Court, in effect, ignored, or at least "not given proper effect", when the Court of Claims by-passes the true and main point of the decision; and, instead of applying the decision, exalts a safety remark as to "estoppel" which the Court's opinion made to take care of a possible future unusual case—and even inac-

curately applies the principle of that remark? (This question refers to the Court of Claims' quotation, at middle of page 17 of pamphlet copy of its opinion, from the case of *Botany Worsted Mills* v. *United States,* 278 U. S. 282.) (R. 26)

2. Where the Court of Claims thus attempts to bring a case within a possible exception, suggested by this Court to an important general rule of law, do not a proper functioning of our system of justice and a due regard of this Court for its own standing, both require careful scrutiny of the case, *by this Court,* to determine whether the Court below really has found a case of the unusual type suggested by what we might call the 1 per cent exception; or whether this case is not rather one of the 99 per cent wherein the decision of this Court should be applied without cavil? If the Court of Claims has done what we here indicate (i. e., has improperly treated a case as being within a rare exception to a general rule, declared by this Court and thereafter followed by several Circuit Courts) is that not a departure "from the accepted and usual course of judicial proceedings"?

3. Is not the decision of the Court of Claims, in this case, in conflict with decisions, on the same matter, of several Circuit Courts of Appeals, when it goes counter to the portion of the 6th Circuit Court's statement in its decision of *Joyce* v. *Gentsch,* 141 F. (2d) 891, to the effect that:

> "Upon the principle of the *Botany Mills* case, the consent of the Secretary of the Treasury has been considered by circuit courts of appeal as essential to the validity of a stipulation concerning tax liability, where such stipulation is in the nature of a compromise." (citing four cases in support) *Joyce* v. *Gentsch,* 141 F. (2d) 891, 895?

The four decisions cited, together with the *Joyce* case, constitute five cases from four different circuits. Such four cases are:

Brast v. *Winding Gulf Colliery Co.* (C. C. A. 4) 94 F. (2d) 179;

Hughson v. *United States* (C. C. A. 9) 59 F. (2d) 17, 19;

Anderson, Collector of Internal Revenue v. *P. W. Madsen Inv. Co.* (C. C. A. 10) 72 F. (2d) 768, 770;

Schneider v. *United States* (C. C. A. 6) 119 F. (2d) 215, 217.

IV

Errors Assigned

1. The Court of Claims, in this case, erred:

(a) In finding that the two paragraphs, in the waiver, defendant's Exhibit 5, preceding plaintiff's signature, "were not a part of the printed form"—apparently meaning prior to the time (supposedly at the Technical Staff conference) when the parties purportedly agreed to the substance of these two added paragraphs;

(b) In finding that these two paragraphs "were typed on the form by the parties"; and

(c) In finding that such alleged typing was done "after an agreement was reached on the issues in controversy"—obviously meaning an agreement in the nature of a compromise.

2. The trial Court erred in making any and all of its findings of alleged facts tending to indicate—and in reaching any conclusions to the effect—(a) that the plaintiff in any wise took the initiative; or (b) even took any part, in any plan or action (1) toward compromising this tax matter or (2) toward entering a closing agreement with the Government in respect to it, there being a lack of evidence of

record to sustain any and all of the trial Court's said findings or to support its said conclusions.

3. The Court of Claims erred in failing to make findings of fact on material issues to the effect: (a) That the plaintiff did not, at any time, make anything in the way of a compromise offer respecting these proposed additional taxes for 1938 and 1939; (b) That he did not, either at the conference in the office of the Internal Revenue Agent in Charge or before the Technical Staff of the Bureau, make any offer or proposal in the nature of a compromise offer as to these taxes; (c) That there was not in either of these conferences any element of trade or of offering to concede on some items if the other party would concede on others; (d) That—referring to the Technical Staff's letter of May 5, 1941, defendant's Exhibit 3, to plaintiff's attorney, and to the expression it contained: "Your proposal for settlement of the above-entitled matter has been accepted"—there was no such "proposal for settlement" made by the plaintiff in this case; and (e) That there wasn't anything in the nature of trading, or conceding, or relinquishing the several items between the representatives of the Bureau and the taxpayer; it wasn't a case of "We'll do this and you do that."

4. The Court of Claims erred in failing to make findings of fact on other material issues to the effect: (a) That agreement was reached, on the tax determining items in controversy between the taxpayer and the Government, by reason of the fact that he and his counsel, after conferences before the office of the Internal Revenue Agent in Charge and of the Internal Revenue Bureau's Technical Staff, early in 1941, determined that the law, as it then stood, was against them in respect to getting such items allowed as business expense deductions in determining taxable income, since, under principles set forth in a then recent Supreme Court decision, this taxpayer was not considered to have

been "engaged in business" in the taxable years 1938 and 1939; (b) That the Bureau had not questioned that the taxpayer actually had paid such items of expense, nor that they were ordinary and necessary expenditures in each case for the purpose claimed; but took the position that they were not proper business expense deductions since he was not "engaged in business"; (c) That there was no element of trade, or bargaining, or receding by either party in respect to the item of deduction, claimed from taxable income for a statutory, casualty loss in 1938, by reason of hurricane damage to an estate the taxpayer then owned on Long Island; the taxpayer's attorney, at the suggestion of the Bureau in Washington, having negotiated, as to the amount to be allowed for this loss, with the office of the Internal Revenue Agent in Charge in New York; and the attorney for the taxpayer, having come to the conclusion at the Technical Staff conference that the difference between them on this hurricane damage item was not worth litigating, suggested to the conferees that that would wind up the case; and (d) That neither the matter of the allowance of this casualty loss deduction, nor its amount, was in issue before the trial Court, that is to say, neither party contested the correctness of the amount which the Bureau, through the office of its Internal Revenue Agent in Charge, at New York, finally allowed for it.

5. The Court of Claims erred, likewise, in failing to find as facts (a) That, upon the taxpayer's attorney concluding that the hurricane damage item was not worth litigating and telling the conferees that that would wind up the case, they asked him if he would recommend to his client that he sign a waiver; and he said that he would because they were interested in stopping the running of interest; and the Technical Staff then prepared the waiver, sent it to the taxpayer's tax counsel, and the taxpayer signed it and returned it; and

(b) That, so far as the taxpayer's counsel knew, the filled-out waiver was not available at the Technical Staff conference; but that the conferees said they would send it to the taxpayer, that they would prepare the necessary papers and send them to the taxpayer for his signature.

6. The trial Court (a) further erred in failing to find as facts that the plaintiff did not take the inititive (1) toward giving or providing the waiver of May 6, 1941; or (2) toward obtaining any closing agreement on the taxes here in issue with the Government; or (3) toward compromising such taxes, or in any plan or action looking toward such a compromise; and (b) also erred in failing to find as a fact and to conclude that the plaintiff did not take any part in any plan for any of such acts or procedures, except merely the signing and returning of the waiver, the giving of which the Government suggested, and which it prepared and sent to him.

7. The Court of Claims erred in not finding (a) That there was no agreement at all of the nature which the Government is contending the waiver, in evidence in this case, constitutes, for the reason that the two added paragraphs are a nullity—in respect to effecting any possible "compromise"—because they fail to conform to the statutory requirement as to "compromises", i. e., they do not have the approval of the Secretary, or Assistant Secretary, or Undersecretary of the Treasury; and (b) That any words, suggesting a compromise or a proposal by the taxpayer to compromise his taxes—in the two added paragraphs of the waiver and the parts of Exhibit 3 (letter of May 5, 1941, at Ct. Cls. Special Finding No. 5) and Exhibit 6 (letter of May 7, 1941, at Ct. Cls. Special Finding No. 8), and other like communications—were merely self-serving declarations made by the defendant.

8. The trial Court erred in not finding (a) That the waiver here in issue was not intended as a "compromise" or as a

"settlement agreement"; (b) That the innuendoes—which the added paragraphs of the waiver, and other instruments or letters written by the Government, contained, intimating a "compromise" had been reached on the amounts of the taxes for the two years in issue—were merely self-serving declarations with no legitimate background or basis in the precedent facts; (c) That such amounts of tax to be paid were determined, by the Government's own calculations, after petitioner and his counsel had gone through the usual conference procedure followed in the Bureau of Internal Revenue and had concluded, during that process, that the law was against the taxpayer being allowed the claimed deductions as business expenses; and that the final difference between him and the Government on another item was not worth his while litigating; (d) That the taxpayer made no compromise offer or settlement proposal, at any time, to the Government; and (e) That there was no "compromise" or "settlement agreement" negotiated or discussed at any of the conferences which taxpayer and his counsel had with the Government's representatives.

9. The Court of Claims erred in not finding that the Government, itself, was guilty of "misrepresentation of a material fact" or facts which, under the specific terms of the Internal Revenue Code, Sec. 3760 (b), would have justified *the taxpayer* in reopening the case and, by a suit such as this one, in having the determination, assessment, and collection of the tax annulled, modified, and set aside—*even if* the purported compromise or settlement agreement had had the approval of the Secretary of the Treasury or his designated representatives; said misrepresentation by the Government having been that the taxpayer had made a proposal for settlement of the case and that there had been a "compromise" or "closing agreement" negotiated at the conferences; whereas neither of these misrepresentations was true in any sense whatsoever.

10. The trial Court (a) erred in concluding and holding that the plaintiff was precluded by the alleged "finality" of the so-called "compromise" or "closing agreement", contained in the waiver, from maintaining suit on his claims for the refund in issue here; and (b) also erred in concluding that this situation presents a proper case for application of the doctrine of equitable estoppel against petitioner.

11. The Court of Claims erred in not giving consideration and full effect, in its findings and decision in this case, to Section 121 (a) (2), (d), and (e) of the 1942 Revenue Act as a remedial, curative, or relief statute, allowing taxpayers non-trade and non-business deductions for expenses paid for the purposes recounted in said subsection (a); and making said allowance retroactive as provided in said subsections (d) and (e).

12. The trial Court erred in not holding and deciding—in harmony with the decision of this Court in the case of *Botany Worsted Mills* v. *United States,* 278 U. S. 282; and also in harmony with several Circuit Courts of Appeals —that, in a situation such as that of the instant case, the consent of the Secretary of the Treasury, or one of his designated assistants, is essential to the validity of a stipulation concerning tax liability, where such stipulation is "in the nature of a compromise".

13. The Court of Claims erred in not deciding and holding that the plaintiff was entitled to recover the full amounts of overpaid income taxes, sued for herein, for the years 1938 and 1939, together with interest thereon from the dates of their overpayment.

(It should be noted here that the petitioner sees a great many more errors of fact and of law in the Court of Claims' findings and decision, which we specified in our motion to that Court for a new trial and for amendment of findings;

and which we have faith in that Court's willingness to correct upon a then proper motion from us, if and after this Court shall have clarified and established the law on the question of either enforcing or by-passing the plain statutory requirement for approval of compromise agreements by the Secretary of the Treasury, and the right and wrong ways to apply the doctrine of equitable estoppel; but we have deemed it fitting here to raise only the primary or main issues on which the Court of Claims' opinion was based, and the facts necessary to those issues, rather than to seek to make this Court a reviewer of the facts in general.)

V

Reasons Relied On for Allowance of the Writ

The questions we seek to raise in this case are of general importance, that is to say, "there are special and important reasons" for this Court to review them. The decision of the Court of Claims herein, if it is permitted to stand, would inject a new principle into the law—one which we might call the doctrine of "easy estoppel".

The decision of the Court of Claims, in this case, is effectively in conflict with applicable decisions of this Court, that is to say, it has not given proper effect to them, some of such decisions being:

Botany Worsted Mills v. *United States,* 278 U. S. 282 and
R. H. Stearns Company v. *United States,* 291 U. S. 54.

Among other provisions as to when this Court may accept a case for review, is that in Rule 38-5 (b), to the effect that this Court may so accept a case where the lower Court "has so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this Court's power of supervision." It is believed that the "accepted and usual course of judicial proceedings" con-

notes and requires correct reasoning, at least in a case of clear and undisputed facts. The first requirement of any proper exercise of judgment must be that it should be accurately reasoned, especially where the facts are simple and unequivocal.

Some of the phrases used, in defining the term "judicial" at 50 C. J. S. 559, as relating to the judiciary, indicate that, in its more technical sense, the word "judicial" imports an act, duty, function, or power "pertaining to * * * the administration of justice"; "proper to a court of law"; "practiced in the distribution of justice"; "proceeding from a court of justice"; or "relating to the dispensation of justice". Some of the same expressions, and perhaps others similar, are found also at 34 C. J. 1177.

The essence of the supposed estoppel (as recounted at what we have called the key paragraph of the Court of Claims' opinion, commencing middle of page 17 of the pamphlet copy (R. 26)) is the inequity of allowing a taxpayer to renounce his "agreement" at a time when "the Commissioner cannot be placed in the same position he was when the agreement was executed." The inaccuracy or flaw in the Court's reasoning, at this place, is that *it literally was not true that the Commissioner was out of his "same position"* (meaning still able to assess and collect further deficiencies if he so desired) *in respect to 1939,* the second of the two tax years here in issue, at the time the claims for refund were filed, November 19, 1942. Under the normal process of collection, i.e., the tax first being assessed, the statute of limitation in this respect, as to 1939, did not run until March 15, 1943. Internal Revenue Code, Sec. 275 (a). This left the Commissioner approximately four months, after the filing of the claims, in which to have assessed additional taxes for 1939, if he had so desired. *Hence, by the Court's own standard, the equitable estoppel*

against this taxpayer must totally fail as to the second of the tax years involved in this case.

Other far departures from the "accepted and usual course of judicial proceedings" by the Court of Claims in this case are where it, in aid of action first taken by the Bureau of Internal Revenue, has:

(1) Perverted one statute, Internal Revenue Code, Sec. 272 (d) providing for a waiver in the form of a "signed notice in writing", a unilateral instrument;

(2) Violated one of two other statutes, Internal Revenue Code, Section 3760 as to Closing Agreements; or Section 3761 as to Compromises (by attempting to fudge through an instrument accomplishing one or the other of these purposes without its having the approval of the Secretary or Assistant Secretary or Undersecretary of the Treasury, as each of such sections requires);

(3) Refused, without explanation, to give effect to a later relief statute, Revenue Act of 1942, Sec. 121, granting non-business deductions and making such allowances retroactive.

This decision, rendered by the Court of Claims, is in conflict with the decisions of several Circuit Courts of Appeals on the same subject matter, that is, (a) What weight should be given, in respect to so-called agreements or stipulations "in the nature of a compromise", to the statutory requirement of Internal Revenue Code Section 3761, to the effect that the Commissioner of Internal Revenue, "with the approval of the Secretary or of the Undersecretary of the Treasury, or of an Assistant Secretary of the Treasury, may compromise", etc.; or (b) What weight should be given, in respect to "closing agreements", to the similar requirement of Internal Revenue Code, Section 3760, to the effect that an agreement in writing between the Commissioner of

Internal Revenue and the taxpayer, relating to his tax liability, if approved by one of the same officers above mentioned, "shall be final and conclusive"? The Circuit Court cases referred to are the *Joyce* case and the other four cases mentioned therein following the quotation hereinabove given, at *Joyce* v. *Gentsch* (C. C. A. 6th Circ., 1944) 151 F. (2d) 891, 895.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Claims, commanding that court to certify and to send to this Court for its review and determination, a transcript of the record and of the proceedings in the case entitled and numbered on its docket: M. Robert Guggenheim, Plaintiff, v. United States of America, Defendant, No. 46,775; and that the judgment of said court may be reversed by this Honorable Court with proper directions to cure the errors below; and that your petitioner may have such other and further relief as to this Court may seem just and proper.

Errett G. Smith,
1152 National Press Bldg.,
Washington 4, D. C.,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 405

M. ROBERT GUGGENHEIM,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent

SUPPORTING BRIEF

(To Petition for Writ of Certiorari)

I

Opinion of Court Below

The opinion of the United States Court of Claims (R. 22) had not been officially reported.

II

Jurisdiction

Judgment of the Court of Claims was entered April 5, 1948 (R. 27). Plaintiff's Motion for New Trial and for Amendment of Findings was overruled on June 28, 1948 (R. 28). Jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, c. 229, 43 Stat. 939, as amended,

and as finally amended by Title 28 U. S. Code (effective September 1, 1948), section 1255(1). The claimant's Petition for Writ of Certiorari is being filed herewith. Time for filing petition for writ of certiorari was, by the September 22, 1948, order of Associate Justice Wiley Rutledge, extended to and including November 9, 1948 (R. 40) Act of February 13, 1925, c. 229, Sec. 8, 43 Stat. 940; Title 28 U. S. Code Sec. 2101(c) as amended effective September 1, 1948.

III

Statement of the Case

The Statement of Matter Involved in the case, together with the Errors Assigned, in the Petition for Writ of Certiorari, *supra*, it is believed, fully recite all that is material to the consideration of the questions presented. Hence, a restatement of those points, is omitted from this part of the Brief, in order to avoid repetition.

IV

Specification of Errors to Be Urged

Petitioner is relying upon all of the errors assigned in his Petition for Certiorari but intends especially to urge those following:

1. The Court of Claims (a) erred in finding that the two paragraphs, added to the waiver (which the evidence, upon careful observation, shows were added to the waiver form by the Government alone, by being printed thereon either by mimeograph or by the multi-lithographing process, in or about the month of "June 1940"), "were not a part of the printed form"—apparently meaning at the time the Technical Staff conference was held, on or about May 1, 1941; (b) also erred in finding that these two paragraphs "were

typed on the form by the parties"; and (c) further erred in finding that this alleged typing was done "after an agreement was reached on the issues in controversy"—apparently meaning an agreement in the nature of a "compromise".

2. The Court of Claims erred in making any and all of its findings tending to indicate—and in reaching any conclusions to the effect—(a) that this petitioner in any wise took the initiative; or (b) that he even took any part, in any plan or action (1) toward "compromising" this tax matter, or (2) toward entering a "closing agreement" with the Government in respect to it.

3. The Court of Claims erred in failing to make findings of fact on material issues to the effect: (a) That the plaintiff did not, at any time, make anything in the way of a compromise offer respecting these proposed additional taxes for 1938 and 1939; (b) That he did not, either at the conference in the office of the Internal Revenue Agent in Charge or before the Technical Staff of the Bureau, make any offer or proposal in the nature of a compromise offer as to these taxes; (c) That there was not in either of these conferences any element of trade or of offering to concede on some items if the other party would concede on others; (d) That—referring to the Technical Staff's letter of May 5, 1941, defendant's Exhibit 3, to plaintiff's attorney, and to the expression it contained: "Your proposal for settlement of the above-entitled matter has been accepted"—there was no such "proposal for settlement" made by the plaintiff in this case; and (e) That there wasn't anything in the nature of trading, or conceding, or relinquishing the several items between the representatives of the Bureau and the taxpayer; it wasn't a case of "We'll do this and you do that".

4. The Court of Claims erred, likewise, in failing to find as facts (a) That, upon the taxpayer's attorney concluding

that the hurricane damage item was not worth litigating and telling the conferees that that would wind up the case, they asked him if he would recommend to his client that he sign a waiver; and he said that he would because they were interested in stopping the running of interest; and the Technical Staff then prepared the waiver, sent it to the taxpayer's tax counsel, and the taxpayer signed it and returned it; and (b) That, so far as the taxpayer's counsel knew, the filled-out waiver was not available at the Technical Staff conference; but that the conferees said they would send it to the taxpayer, that they would prepare the necessary papers and send them to the taxpayer for his signature.

5. The Court of Claims (a) erred in failing to find that the petitioner *did not take the initiative* (1) toward giving or providing the waiver of May 6, 1941, or (2) toward obtaining any "closing agreement" on the taxes here in issue with the Government, or (3) toward "compromising" such taxes, or in any plan or action looking toward such a "compromise"; and (b) also erred in failing to find and conclude that the petitioner *did not take any part* in any plan for any of such acts or procedures (except merely the signing and returning of the Waiver, the giving of which the Government suggested and which it alone, prepared and sent to him).

6. The Court of Claims (a) erred in concluding and holding that the petitioner was precluded, by the alleged "finality" of the purported "agreement" contained in the waiver, from maintaining suit on his claims for refund in issue here; and (b) further erred in concluding that this situation presents a proper case for application of the doctrine of equitable estoppel against petitioner.

7. The Court of Claims erred in not giving consideration and full effect, in its findings and decision in this case,

to Section 121 (a) (2), (d), and (e) of the 1942 Revenue Act as a remedial, curative, or relief statute, allowing taxpayers non-trade and non-business deductions for expenses paid for the purposes recounted in said subsection (a); and making said allowance retroactive as provided in said subsections (d) and (e).

8. The Court of Claims erred in not holding and deciding —in harmony with the decision of this Court in the case of *Botany Worsted Mills* v. *United States*, 278 U. S. 282; and also in harmony with several Circuit Courts of Appeals— that the consent of the Secretary of the Treasury, or one of his designated assistants, is essential to the validity of a stipulation concerning tax liability, where such stipulation is "in the nature of a compromise".

9. The Court of Claims erred in not deciding and holding that the plaintiff was entitled to recover the full amounts of overpaid income taxes, sued for herein, for the years 1938 and 1939, together with interest thereon from the dates of their overpayment.

V

ARGUMENT

Summary of Argument

1. No ground exists for equitable estoppel herein—

(a) Court of Claims' own standard as to applying equitable estoppel totally fails to show any such estoppel when viewed against the facts respecting 1939, the second of our two tax years.

(b) By the somewhat different standard, as to when a possible equitable estoppel might apply, which the Circuit Court of Appeals, 6th Circuit, used in the decision of *Joyce* v. *Gentsch,* 141 F. (2d) 891, there could be no equitable estoppel for either of our tax years.

(c) This petitioner did nothing and took no initiative, in any respect, which would justify applying the doctrine of equitable estoppel to him in this case (regardless of what standard is used for determining whether the Commissioner of Internal Revenue was in the "same position" at one time as he had been at some previous time) as is obvious by even a reasonably careful analysis of the elements and principles of that doctrine.

2. The Court of Claims' decision does not give proper effect to certain decisions of this Court; and, in fact, is directly in conflict with one of them, to wit, *Botany Worsted Mills* v. *United States*, 278 U. S. 282. The other decision of this Court, to which the Court of Claims did not give proper effect, was *R. H. Stearns Co.* v. *United States*, 291 U. S. 54.

3. By its decision, the Court of Claims has aided and abetted the Bureau of Internal Revenue; and also, on its own responsibility, has:

(a) perverted that part of our statutory law which prescribes the type of Waiver here in issue as a "signed notice in writing," a unilateral instrument, which therefore, if properly designed according to the intent of the statute, is not an "agreement" of any kind (Int. Rev. Code, Sec. 272 (d));

(b) violated one or both of two other portions of our statutory law, Sec. 3760 of the Internal Revenue Code as to "closing agreements"; or Sec. 3761 as to "compromises" by trying to fudge through the so-called "agreement," either as a "final and conclusive" "closing agreement" or as a "compromise," without its having the approval of the Secretary or Assistant Secretary or Undersecretary of the Treasury, as these sections of the law both required of each such type of instruments; and

(c) refused to give effect to the remedial statute allowing deduction, from taxable income, of non-business expenses and making such allowance definitely retroactive. Sec. 121 of Revenue Act of 1942.

4. The Court of Claims' decision herein is in conflict with the decisions of several Circuit Courts of Appeals on the same subject matter—i.e., what weight should be given the requirements for approval, by the Secretary, Assistant Secretary, or Undersecretary of the Treasury, of "closing agreements" per Internal Revenue Code, Sec. 3760; and of "compromises" per Sec. 3761—such decisions being:

Joyce v. *Gentsch*, 141 F. (2d) 891;
Brast v. *Winding Gulf Colliery.* (C. C. A. 4) 94 F. (2d) 179;
Hughson v. *United States* (C. C. A. 9) 59 F. (2d) 17;
Anderson, Collector of Internal Revenue v. *P. W. Madsen Inv. Co.* (C. C. A. 10) 72 F. (2d) 768;
Schneider v. *United States* (C. C. A. 6), 119 F (2d) 215.

5. One of the "special and important reasons" why the Court of Claims' decision rendered herein should not be permitted to stand is that it would inject into our tax law a brand-new principle which could be called the "doctrine of easy estoppel." Whether this innovation shall be permitted to occur, through the back-handed instrumentality of an unfortunately erroneous opinion of a trial court, renders this case one of general importance.

6. Showing that the petitioner was acting within the spirit of the statutes; whereas the Government was not doing so, is the circumstance that the Government, itself, was guilty of "misrepresentation of a material fact" or facts which, under the specific terms of the Internal Revenue Code, Sec. 3760 (b), would have justified *the taxpayer* in reopening the case and, by a suit such as this one, in having

the determination, assessment, and collection of the tax annulled, modified, and set aside—*even if* the purported compromise or settlement agreement had had the approval of the Secretary of the Treasury or his designated representative; said misrepresentation by the Government having been that the taxpayer had made a proposal for settlement of the case and that there had been a "compromise" or "closing agreement" negotiated at the conferences; whereas neither of these misrepresentations was true in any sense whatsoever.

Argument

A supposed equitable estoppel of this petitioner-taxpayer, against his suing to recover overpaid income taxes after disallowance of his refund claims therefor, is the principal basis for the decision of the Court of Claims in respect to which the petitioner now seeks certiorari. The supposed estoppel is based on the incorrect assumption that the taxpayer had sought to renounce a so-called "agreement," in the nature of a compromise of his taxes, at a time when "the Commissioner cannot be placed in the same position he was when the agreement was executed."

That assumption in respect to the second of the two tax years here involved, 1939, is literally untrue and obviously incorrect because the statute of limitations against the Commissioner's assessing of additional taxes for that year, if he had desired to do so, lacked approximately four months of having run at the time the taxpayer filed his refund claims for the two years 1938 and 1939. Thus, by the Court of Claims' own standard for determining whether the Commissioner was "in the same position," the purported estoppel herein must totally fail as to the tax year 1939.

However, the Sixth Circuit Court of Appeals, in the case of *Joyce* v. *Gentsch*, 141 F. (2d) 891, uses a different standard or period for determining a possible estoppel in this

type of situation. That Court uses the period between the executing of the waiver and the expiration of the statutory time for assessing, and thus finds, in that case, that the Commissioner had more than five months in which he "could have asserted a further deficiency." Applying that standard to the instant case, we should note first that the so-called "agreement" was in and a part of the waiver. By such a standard, the Commissioner, in the instant case, would have had more than ten months in which to assert a further deficiency as to 1938, the earlier of the two years here involved; and more than one year and ten months as to 1939, the later tax year herein.

An analysis of this case, either cursory or in detail, demonstrates that the petitioner did not take the initiative, that is he did no "acts," in suggesting or obtaining or giving the waiver here involved, which contains the so-called "agreement" which is supposed to have effected the estoppel. The waiver was suggested by the Commissioner's representatives, was entirely prepared and worded by them, and was sent to the taxpayer, through his attorney, for his signature. All he did was to sign it and return it, as requested by the Government. The substance of the law as to this type of estoppel is stated in Corpus Juris thus:

> "Estoppel by misrepresentation, or equitable estoppel, is defined as the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of contract or of remedy. This estoppel arises when one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe

certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts" 21 C. J. 1113, 1114, Sec. 116.

To the same effect, see 31 C. J. S. 236, 237, Sec. 59.

Clearly, this case does not in any respect present a situation where the person alleged to have estopped himself has remained silent when he ought to have spoken out. It never has been suggested that such an element was in the case. Hence, the only question is whether the taxpayer took the initiative, whether he did some act by which he should be precluded from later showing the true facts. It is noted also that there must have been an intentional misleading of the other party, or "culpable negligence." These latter ideas are so remote from any possible fair construction of the facts of the case, or from anything that has been suggested in respect to them, that there is no need, at this point, of repeating the circumstances to show that no such situation existed.

A good resume of the facts which must be found to exist in a case in order to support an estoppel is found under the subject of the instructions which a trial court must give to a jury trying such a case in order to support a finding that estoppel existed. We find such a statement of the requisite facts in Corpus Juris. The text says that, where there is an issue of estoppel, the court should instruct the jury as to the essential elements of the kind of estoppel relied on; and then continues:

"If an estoppel in pais is pleaded, the court must instruct the jury that the representations or silence relied on to create the estoppel were intended to deceive, or were so culpably negligent as to amount to fraud; that the party against whom the estoppel is claimed had knowledge of the truth of the material facts represented

or concealed; and that the party claiming the estoppel was in ignorance of such facts or without means of ascertaining their existence, that he relied on such representations or silence, and was warranted in so doing, that he changed his position in reliance thereon and that he will sustain injury unless the estoppel is sustained." 21 *C. J.* 1253, 1254, Sec. 271.

To the same effect, see 31 *C. J. S.* 464, 465, Sec. 164.

Corpus Juris Secundum defines equitable estoppel and recites the elements which constitute it, after which the text continues:

"* * * and the same definition is given estoppel in pais and estoppel by misrepresentation, these terms, as shown infra in subdivision c of this section, being used interchangeably with the term 'equitable estoppel.' " 31 *C. J. S.* 236, 237, Sec. 59.

The decision of the Court of Claims is in conflict with the decision of this Court in the case of *Botany Worsted Mills* v. *United States,* 278 U. S. 282; and has failed or declined to give effect to it, especially where this Court—in speaking of R. S. Sec. 3229, the predecessor section to the present Internal Revenue Code Sec. 3761, as to compromising cases of taxes "arising under the Internal Revenue laws"—said:

"We think that Congress intended by the statute to prescribe the exclusive method by which tax cases could be compromised, requiring therefor the concurrence of the Commissioner and the Secretary, * * *. When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode. * * *

"It is plain that no compromise is authorized by this statute which is not assented to by the Secretary of the Treasury. * * *." *Botany Worsted Mills* v. *United States,* 278 U. S. 282, 288, 289.

Another decision of this Court, to which the Court of Claims has not given proper effect, is that of *R. H. Stearns Co.* v. *United States,* 291 U. S. 54. In that case, this Court very properly held the taxpayer to have estopped himself, by his acts, from later claiming refund of certain taxes, that is to say, he had taken the initiative in doing the thing which constituted the estoppel. As the opinion of this Court said:

> "* * * *there was a positive request,* which till revoked upon reasonable notice had the effect of an estoppel." *R. H. Stearns Co. v. United States,* 291 U. S. 54, 59. (Italics supplied.)

In that case, the taxpayer, after having made such "positive request", later sought to win its case by taking the opposite position, viz., by saying that the set off, *which it had requested the Commissioner to make,* was definitely illegal.

Here should be made a correction in the Court of Claims' opinion in the instant case where it says we, the plaintiff there, contend "that under no circumstances will a closing agreement be held binding unless executed in accordance with Section 3760 of the Internal Revenue Code". (R. 26) As a matter of fact, we had not made that contention; but the *Stearns* case is so different from the instant situation as to be no authority to the contrary, even if we had.

However, after analyzing the *Stearns* case and all others which have come to our attention, we may as well say now—even though we might not previously have "contended" for quite so strong a position—that, under no circumstances which we can visualize, will a waiver "agreement", anything like the one here in issue and obtained under similar circumstances, properly be held binding unless executed in accordance with Section 3760 of the Internal Revenue Code, at least to the extent of having the approval of the Secre-

tary of the Treasury or the Under Secretary or an Assistant Secretary.

We have suggested that the Court of Claims, by going along with the Bureau of Internal Revenue so strongly in the "agreement" idea as to this waiver which is supposed to be only a "signed notice in writing", a unilateral instrument, has perverted the statutory provision for such a waiver, i. e., Internal Revenue Code, Sec. 272 (d). A mere reading of the section makes this point apparent. A similar violation of the statute is obvious in the way the trial Court has permitted the Bureau to effectuate, through this waiver, an "agreement" in the nature of a compromise of taxes, without complying with the statutory requirements as to "closing agreements", Sec. 3760 of the Code; and as to "compromises", Sec. 3761 of the Internal Revenue Code.

The Court of Claims, in this case, has not given proper effect, nor in fact any effect at all, to the remedial statute which we have invoked, Sec. 121 of the Revenue Act of 1942, which definitely was made retroactive so as to include the tax years here involved—and the passage of which Act was the moving cause of the taxpayer filing the claims for refund which are the basis, procedurally speaking, of this lawsuit. That the liberal construction required for relief statutes extends also to the matter of resolving all reasonable doubts in favor of their applicability to a particular case is shown at 12 C. J. 1302, Sec. 4.

Four cases from various Circuit Courts of Appeals are shown above as cited in *Joyce* v. *Gentsch*, 141 F. (2d) 891, 895, to the effect that consent of the Secretary of the Treasury has been considered essential to the validity of a stipulation concerning tax liability "where such stipulation is in the nature of a compromise". No point would be served in quoting from those cases here. Some of them rule in

favor of the Government on the respective tax issues which they involve, or on other points not pertinent to the instant case, but they all fairly support the statement for which the Sixth Circuit Court cites them in the *Joyce* v. *Gentsch* case.

A proper application of the basic doctrine of estoppel—so very equitable when aptly applied—is so important to the whole structure of our law that a situation, such as that here presented, should not be permitted to generate a new rule or exception which might be referred to as the "doctrine of easy estoppel".

Upon rereading Sec. 3760 (b) of the Internal Revenue Code, in connection with the facts of this case, we were so remarkably impressed with the fact that "the Government", not meaning any particular known person nor anybody with malicious intent of course, had been guilty of a "misrepresentation of a material fact" or facts, that we could not restrain the impulse to bring it to this Court's attention. Such misrepresentation by the Government was its agents' insistence that this taxpayer had made a proposal for settlement of the case and that there had been a "compromise" or "closing agreement" negotiated at the conferences held in the Bureau of Internal Revenue, whereas there was no fair basis whatsoever for such misrepresentations.

Conclusion

It is respectfully submitted, therefore, that this case is one calling for the exercise by this Court of its supervisory powers, in order that the decision of the United States Court of Claims may be reviewed and the errors committed by that Court corrected, and its judgment finally reversed with directions that petitioner was entitled to recover as overpaid income taxes such overpayments as actually were made, which amount was set forth in plaintiff's petition in

that Court as $10,093.11, together with interest thereon from the dates of overpayment, and that to such an end a writ of certiorari should be granted.

Respectfully submitted,

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